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No. 81-1805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee of The Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, *et al.*; UNITED STATES OF AMERICA; and THE INTERSTATE COMMERCE COMMISSION,
Respondents.

REPLY BRIEF OF PETITIONER

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WILLIAM M. GIBBONS, Trustee of The Chicago,
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Respondents.

REPLY BRIEF OF PETITIONER

Respondents Trustee, indenture trustees, and the Henry Crown interests filed a joint brief in opposition to the petition by the Railway Labor Executives' Association [hereinafter, "RLEA"] for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review and to reverse the Judgment of that Court entered on October 13, 1981, in *In re Chicago, Rock Island & Pacific Railroad*, 7th Cir. Nos. 80-1788, *et al.* Petitioner RLEA believes a brief reply should be made to several arguments raised by respondents, and therefore this Reply Brief is respectfully submitted pursuant to Rule 22.5 of the Rules of this Court.

ARGUMENTS

1. The Rock Island Respondents Fail To Acknowledge That The Courts Below Decided The Employee Protection Issue In A Manner Contrary To Both The Will Of Congress And Prior Decisions Of This Court

Respondents confidently assert that the decisions by the lower courts on the employee protection issue are consistent with prior decisions of this Court and with the intent of Congress in enacting the mandatory employee protection requirements of Section 17(a) of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. § 915(a). But in making such assertions, respondents fail to address the fact that they have used their view of legislative intent to support a result which is *contrary* to the plain meaning of the clear and unambiguous language which Congress used to command that: "In authorizing *any abandonment* pursuant to this section, *the court shall require* the carrier to provide a fair arrangement" to protect employees. 45 U.S.C. § 915(a) (emphasis added). This Court has consistently found that such a result (*i.e.*, one contrary to the plain language of a statute) is at odds with the rules of statutory construction. *E.g.*, *Crooks* v. *Harrelson*, 282 U.S. 55, 59-60 (1930); *see also*, *Railway Labor Executives' Assoc.* v. *Scott*, Sup. Ct. No. 81-1715, Reply Br. for Petitioner at 2-3. Moreover, respondents are incorrect in believing that the result reached by the lower courts in this case is in furtherance of the will of Congress in enacting the employee protection requirements of Section 17(a) of the MRRA.

To support their contention that Section 17(a) of the MRRA must be viewed as giving the Rock Island reorganization court the discretion to ignore mandatory language used by Congress, respondents refer to that Act's Conference Report and assert "Congress specifically directed the reorganization court to follow the law of labor protection that had evolved under the Commission's decisions, so that this transfer of jurisdiction [over abandonments] from the Commission to the reorganiza-

tion court would make 'no change in existing law as it affects employee protection.' " Resps.' Br. at 3, *quoting*, H. Rpt. No. 96-583, 96th Cong., 1st Sess. at 27 (1979). Congress, however, gave no such direction.

The only instruction given in Section 17(a) with respect to employee protection was that: "In authorizing any abandonment pursuant" to that section, the court was to provide a fair arrangement of at least a minimum level of protection for employees. In its Conference Report, Congress made the statement that the employee protection requirements it enacted were intended "to make no change in existing law as it affects employee protection" (H. Rpt. No. 96-583, *supra*, at 27), but such a statement, petitioner respectfully submits, cannot be construed as a license to permit the lower courts to disregard the plain meaning of Section 17(a); the plain meaning of that Section is simply a statement of what Congress considered that existing law to be. *Accord, United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980).

Respondents and the lower court's efforts to expand an ambiguous statement in the MRRA Conference Report into a "clear direction" to construe mandatory language as being permissive in an entire line abandonment situation, besides being contrary to this Court's directions on statutory construction, are erroneous for other reasons as well. First, a review of the congressional debates which led to passage of the MRRA will show, petitioner submits, that Congress never considered Section 17(a) as having an exception to its plain meaning for entire line abandonments. Petitioner's research has failed to locate even one reference in either the debates or conference report which specifically refers to such an exception. Respondents and the courts below have been able to locate only the ambiguous reference referred to above to support, in their opinion, their view of the legislative intent. Petitioner RLEA respectfully submits that such silence is telling evidence that

Congress did not intend to achieve a result contrary to the plain meaning of the language it employed. *Accord, United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976). Indeed, it was this very silence which led the General Counsel of the Interstate Commerce Commission [hereinafter "ICC" or "Commission"] in February 1980 to inform Congress that he had concluded that Section 17(a) of the MRRA "obligated" the Rock Island reorganization court to impose employee protective provisions when, and if, it authorized the abandonment of the Rock Island. Letter of ICC General Counsel to Sen. Nancy L. Kassebaum, H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 63 (1980) (reproduced herein as Appendix G at 63a).[1]

Respondents seek to justify this silence by contending that prior to the passage of the MRRA, the ICC "consistently refused to impose labor protection conditions" when authorizing entire line abandonments. Resps.' Br. at 4. However, respondents and the lower courts failed to take into account both the impact which the 1976 amendment had upon that practice, and the limits upon that policy which the ICC had previously stated existed. *See*, Petition at 23-24.

Prior to 1976, the ICC had made it clear that its decision whether or not to impose employee protective provisions in an entire line abandonment was an exercise of discretion which it enjoyed under the Interstate Commerce Act. For example, in

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[1] Respondents allege that "the cost of labor protection could exceed $500 million." Resps.' Br. at 7 (footnote omitted). That estimate, however, is not based upon any facts developed in the record of this case; respondents should not be permitted to make such an unsupported allegation, especially since they successfully objected to a hearing at which such facts could have been developed. Moreover, that allegation fails to recognize that the actual cost of employee protection would probably be well below that figure since the potential costs of such protection compels the estate, in an effort to minimize its exposure to unemployment costs, to require potential purchasers of Rock Island lines to hire Rock Island employees. Without such potential costs, there is no incentive to exact hiring commitments as a condition of the sale.

Okmulgee Northern Ry.—Abandonment, 320 I.C.C. 637, 645-46 (1964), a small railroad entire line abandonment case, the ICC stated that it could impose employee protective conditions in an appropriate case, but declined to do so in that case because there were no "special circumstances" dictating a departure from its usual practice. Three (3) Commissioners dissented in that case. In *Seaboard Air Line R.—Trackage Rights*, 312 I.C.C. 797, 800 (1962), an entire line abandonment case in which it imposed employee protective conditions, the Commission stated as follows:

> Although we have not generally imposed such conditions in cases involving abandonment of an entire line of railroad, there is no statutory prohibition on our doing so and, where circumstances make such action reasonable and in the public interest, it is our duty to afford protection to employees who may be adversely affected by such an abandonment.

In *Penn Central Transportation Co.—Reorganization*, 347 I.C.C. 45, 92 (1973), the Commission indicated that the unemployment of a large number of employees was a special circumstance which would justify the imposition of employee protection in entire line abandonment cases.

Congress, of course, has the ultimate authority to declare what form of commerce regulation is appropriate in the public's interest (*e.g.*, *Ecker* v. *Western Pac. R.*, 318 U.S. 448, 468 (1943)), and in 1976 Congress instructed the ICC to impose a fair arrangement, of at least a certain level, to protect employees affected by abandonments. Section 802, Pub. L. No. 94-210, 90 Stat. 31, 127 (1976) (since recodified as 49 U.S.C. § 10903, *et seq.*) The plain language of that statute deprived the ICC of discretion to decline to impose protective conditions, and, petitioner submits, instructed the ICC that henceforth the public interest required the imposition of employee protections in "each" abandonment. 49 U.S.C. § 10903(b)(2). That command, petitioner submits, was part of the "existing law" to

which Congress referred when it enacted Section 17(a) of the MRRA.

A second defect with respondents' assertions is that they and the lower courts totally ignored the clear and unequivocal indications by Congress that it was Congress' will that Rock Island employees be protected when, and if, the debtor was authorized to be abandoned. Before the reorganization court authorized the abandonment of the Rock Island in June 1980, Congress expressed its belief that Section 17(a) of the MRRA had required employee protection in the Rock Island liquidation. H. Rpt. No. 96-839, *supra*, at 21-22. Moreover, in enacting, and then reenacting the employee protection provisions of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1005, 1008 (*but see, Railway Labor Executives' Assoc., Inc.*, v. *Gibbons*, Sup. Ct. Nos. 80-415 and 80-1239, decided March 2, 1982), Congress has twice emphasized that it considered protection of Rock Island employees to be essential to its effective regulation of rail commerce. Surely, the failure of respondents and of the lower courts to examine such strong indicia of Congressional intent in this case (*e.g.*, *United States* v. *American Trucking Assoc.*, 310 U.S. 534, 543 (1940)) is reason enough for this Court to exercise its supervisory powers to review the lower courts' decisions on such a crucial area in the relationship between the power of Congress to enact regulations of commerce and the duty of the courts to enforce those regulations as written.

II. Contrary To Respondents' Assertions, This Case Does Present Important Issues Concerning The Power Of Congress To Regulate Commerce

According to respondents, this Court should not exercise its discretionary powers to review the lower courts' decisions at bar because, they assert, this case is of only limited precedential value and presents no constitutional issue. In advancing such assertions, however, respondents totally ignore the impact

which this case has had upon Congress' efforts to regulate commerce in the Rock Island service area in a manner which Congress deemed appropriate. *See*, 45 U.S.C. § 1001; Pet. at 25. Moreover, respondents' effort to belittle the importance of this case by asserting that petitioner is seeking an advisory opinion on constitutional issues is contrary to the facts of this case and to respondents' arguments both to the lower courts and to this Court.

Respondents' attempts to denigrate the constitutional issue presented by this case are without merit. First, as respondents argued to the court of appeals and to this Court in both their Rock Island Act brief (*Id.* at 33) and their brief in opposition to this petition (Resps.' Br. at 5), it is their contention that the *Brooks-Scanlon*[2] principle prohibits as a matter of constitutional law the imposition under Section 17(a) of the MRRA of a requirement to protect employees. That issue, as the letter from the ICC General Counsel to Senator Kassebaum shows (Appendix H at 63a), is an important and unsettled question as to Congress' power to require a liquidating railroad to aid its employees survive the demise of their employer. While it is correct that this Court need not reach that issue in this case if it concludes that the lower courts' construction of Section 17(a) was correct, the fact that the need to address this issue is contingent does not render this question non-justiciable. *Compare, Regional Rail Reorganization Act Cases*, 419 U.S. 102, 145-46 (1974), *with, Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584 (1947). More importantly, in light of the reorganization court's express reliance upon *Brooks-Scanlon* to justify its refusal to impose employee protective provisions in this case (Pet. at 20a), this case is an excellent vehicle to resolve the constitutional issue presented herein.

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[2] *Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U.S. 396 (1920).

Respondents' efforts to belittle the precedential value of this case are also without merit, for those reasons set forth in the petition (Pet. at 19-20), and for the following reason.

As the Rock Island Transition and Employee Assistance Act, 45 U.S.C. § 1001, *et seq.*, clearly shows, Congress is of the belief that protection of Rock Island employees is essential to its regulation of commerce in the Rock Island service area. Respondents have previously argued that the failure of Congress to require such protection in Section 17(a) of the MRRA effectively precluded Congress from requiring in the Rock Island Act that the debtor aid its employees. Appellees' Br. in *Railway Labor Executives' Assoc.* v. *Gibbons*, Sup. Ct. Nos. 80-415 and 80-1239 at 28-34, 55-60. Certainly they will raise such constitutionally based arguments if Congress, in light of this Court's rejection of Sections 106 and 110 of the Rock Island Act, again requires by legislation that the estate protect employees affected by the Rock Island's demise.[3] Consequently, it is beyond dispute that the case at bar is of great importance to Congress' ability to regulate commerce effectively.[4]

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[3] Such an argument is not speculative for Congress is presently considering reenacting the employee protective features of the Rock Island Act on a generic basis which applies to the Rock Island reorganization proceeding. H.R. 6308, 97th Cong., 2nd Sess.

[4] Respondents' argument that this case lacks real precedential value because it is unpublished ignores reality. *See, Wise* v. *Murphy*, 275A.2d 205, 214-15 (D.C. App. 1971).

CONCLUSION

For the reasons stated herein and previously stated, petitioner RLEA respectfully requests that a Writ of Certiorari be issued to review and to reverse the Judgment of the Seventh Circuit.

Respectfully submitted.

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